THE PACIFIC BANK BHD

v.

KERAJAAN NEGERI SARAWAK

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
AZHAR MA'AH JCA
[CIVIL APPEAL NO: Q-01-10-05]
18 JANUARY 2011

BANKING: *Guarantee and indemnity - Demand made after lapse of guarantee - Default occurred within guarantee period - Whether demand valid*

CONTRACT: *Guarantee - Banker's guarantee - One-year guarantee - Default occurred within guarantee period but demand made after its lapse - Whether demand rendered invalid - Whether term limiting period of guarantee contravening s. 29 Contracts Act 1950*

The respondent issued a forest timber licence to a company called Niah Native Logging Sdn Bhd ('Niah Native'). The appellant bank, under a letter of guarantee, guaranteed payment of all royalties due and payable by Niah Native to the respondent under the license. In the event Niah Native defaulted in its royalty payments, the appellant was liable to pay the respondent a sum not exceeding RM100,000. The guarantee was valid for one (1) year from 25 April 1997 until 24 April 1998 with the following relevant endorsement ('endorsement'):

> All claims, if any, in respect of this guarantee shall be made during the guarantee period failing which we shall be deemed to have been discharged and released from all and any liability under this guarantee.

It turned out that Niah Native defaulted in its royalty payments to the respondent and a demand letter was issued by the respondent to the appellant bank. However, the demand letter was issued six months after the lapse of the guarantee although the default in payments had occurred within the guarantee period. The appellant did not comply with the letter of demand on the ground that it was issued after the guarantee period. The

A respondent invoked s. 29 of the Contracts Act 1950 ('s. 29') arguing that the endorsement in the letter of guarantee was bad in law. The learned judge, in favour of the respondent, held that the endorsement did have the effect of limiting the period within which the respondent could enforce its right under the guarantee
B and was therefore void to that extent by virtue of s. 29. The appellant now appealed.

Held (dismissing the appeal with costs)
Per Abu Samah Nordin JCA with Azhar Ma'ah JCA
C **concurring (majority):**

(1) The word "enforce" in s. 29 did not necessarily mean that a person had to enforce his rights by an action in court. In the context of the letter of the guarantee, the letter of demand by
D the respondent was itself an expedient and proper means to enforce the guarantee. It was not a precondition that the respondent must file an action in court to enforce its claim under the guarantee. It was only where the demand was not honoured that the respondent might commence an action in
E court. (para 13)

(2) A commercial commonsense approach should be adopted to construe a guarantee containing a term limiting the time to make a claim within a specified period (*MBf Insurance Sdn Bhd v. Lembaga Penyatuan & Pemulihan Tanah Persekutuan, (FELCRA)*; CA). Since the default committed by Niah Native
F occurred during the life span of the guarantee, the respondent's demand on the guarantee thereafter was not rendered invalid. (paras 16 & 17)

G **Per Hishamudin Mohd Yunus JCA (dissenting):**

(1) The endorsement did not offend s. 29. It was only in respect of the making of a claim. It did not concern the respondent's right to enforce the claim once a claim had been made within
H the prescribed time limit. (para 39)

(2) The time limitation in s. 29 was not in respect of the making of a claim but the enforcing of a right. Making a claim and enforcing a right were two different things. Making a claim was the preliminary step whereas enforcing a right arose once the
I preliminary step was taken – provided it was validly taken and

the claim or demand remained unsatisfied. The making of a claim preceded the enforcing of a right. The making of a claim did not necessarily result in the enforcement of a right; for the party against whom the claim was made might satisfy the claim. If that happened, the matter would just end there and the question of enforcing a right would not arise. Further, the making of a claim did not involve a court action. It merely entailed the making of a demand – a demand following a breach. Enforcing a right involved a court action and in the context of s. 29, it was a right to enforce the right to payment. But the right to payment did not arise unless the respondent had made a valid claim, *ie*, within the prescribed time frame. (para 39)

(3) The endorsement with the words, "Claim, if any, must be received ..." referred to the making of a claim to the guarantor and not to the filing of a claim in court. The word "received" must mean the receipt of the claim by the guarantor from the claimant. The endorsement did not speak of the filing of a claim in court. (para 44)

(4) The respondent's argument on the ambiguity of the endorsement or the applicability of the *contra proferentum* rule following *MBf Insurans Sdn Bhd v. Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA)*, was not an issue for determination herein. The parties had agreed that the only issue for determination was whether the endorsement contravened s. 29. (paras 44 & 48)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah mengeluarkan satu lesen pembalakan kepada sebuah syarikat yang dipanggil Niah Native Logging Sdn Bhd ('Niah Native'). Berdasarkan satu surat gerenti, perayu bank telah menjamin semua bayaran royalti yang ditanggung dan kena dibayar oleh Niah Native, dan bertanggungan untuk membayar kepada responden sejumlah yang tidak melebihi RM100,000, jika Niah Native ingkar untuk membayar wang royalti. Gerenti yang diberi sah untuk tempoh satu (1) tahun bermula dari 24 April 1997 sehingga 24 April 1998 dan terikat dengan endorsmen berikut ('endorsmen'):

A Semua tuntutan, jika ada, berhubung dengan gerenti ini hendaklah dibuat dalam tempoh gerenti, dan kegagalan berbuat demikian akan dianggap sebagai telah melepaskan dan membebaskan kami dari segala dan sebarang tanggungan di bawah gerenti ini.

B Sepertimana yang berlaku, Niah Native telah ingkar dalam pembayaran royalti kepada responden dan berikutnya satu surat tuntutan telah dikeluarkan oleh responden kepada perayu bank. Bagaimanapun, surat tuntutan telah dihantar enam bulan selepas tamatnya tempoh gerenti, walaupun keingkaran berlaku dalam tempoh gerenti. Perayu enggan mematuhi surat tuntutan atas
C alasan ia dikeluarkan selepas tempoh gerenti tamat. Berikutnya, responden menggunapakai s. 29 Akta Kontrak 1950 ('s. 29') dan sekaligus menghujahkan bahawa endorsmen di dalam surat gerenti adalah tak sah di sisi undang-undang. Yang arif hakim, dengan berpihak kepada responden, memutuskan bahawa endorsmen
D memang mempunyai kesan menghadkan tempoh masa dalam mana responden harus menguatkuasakan haknya di bawah gerenti, dan oleh itu, ia adalah terbatal setakat kesan tersebut di bawah s. 29. Perayu kini merayu.

E **Diputuskan (menolak rayuan dengan kos)**
Oleh Abu Samah Nordin HMR dengan Azhar Ma'ah HMR mempersetujui (majoriti):

(1) Perkataan "enforce" dalam s. 29 tidak semestinya bermaksud
F bahawa seseorang harus menguatkuasakan hak-haknya melalui suatu tindakan mahkamah. Dalam konteks perbahasan gerenti, surat tuntutan oleh responden dengan sendirinya merupakan satu cara wajar dan sesuai untuk menguatkuasakan gerenti. Ianya bukan satu syarat bahawa responden harus memfailkan
G satu tindakan mahkamah bagi menguatkuasakan gerenti. Hanyalah di mana tuntutan tidak dipenuhi bahawa responden mungkin akan memulakan tindakan di mahkamah.

(2) Suatu pendekatan waras komersial harus dipakai bagi mentafsir
H suatu gerenti yang mengandungi terma yang menghadkan tempoh masa untuk membuat tuntutan dalam suatu tempoh yang tertentu (*MBf Insurance Sdn Bhd v. Lembaga Penyatuan & Pemulihan Tanah Persekutuan, (Felcra)*; CA). Di sini, oleh kerana kemungkiran yang dilakukan oleh Niah Native berlaku dalam
I tempoh gerenti, maka tuntutan responden ke atas gerenti selepas tempoh tersebut adalah sah.

Oleh Hishamudin Mohd Yunus HMR (menentang):

(1) Endorsmen tidak bertentangan dengan s. 29. Ia hanya berkaitan dengan pembuatan suatu tuntutan. Ia tidak ada kena mengena dengan hak responden untuk menguatkuasakan tuntutan sebaik tuntutan dibuat dalam tempoh yang ditetapkan.

(2) Had masa di dalam s. 29 bukan mengenai pembuatan suatu tuntutan tetapi mengenai penguatkuasaan suatu hak. Membuat tuntutan dan menguatkuasakan hak adalah dua perkara yang berbeza. Membuat tuntutan adalah satu langkah awalan sementara menguatkuasakan hak akan berbangkit sebaik langkah awalan tersebut diambil – dengan syarat ianya diambil secara sah dan tuntutan masih tidak dipenuhi. Pembuatan tuntutan dibuat sebelum penguasaan hak. Pembuatan tuntutan tidak semestinya membangkitkan penguasaan hak; kerana pihak terhadap mana tuntutan dibuat mungkin akan memenuhi tuntutan. Jika itu berlaku, maka halperkara akan terhenti di situ dan soal menguatkuasakan hak sudah tidak berbangkit. Selain itu, pembuatan tuntutan tidak melibatkan sebarang tindakan mahkamah. Ia hanya menyerlahkan pembuatan satu tuntutan – tuntutan akibat dari suatu pelanggaran. Menguatkuasakan hak akan melibatkan suatu tindakan mahkamah dan di dalam konteks s. 29, ia adalah hak untuk menguatkuasakan hak kepada bayaran. Tetapi hak kepada bayaran tidak berbangkit kecuali responden telah membuat satu tuntutan yang sah, iaitu dalam tempoh masa yang ditetapkan.

(3) Dengan adanya perkataan "Tuntutan, jika ada, hendaklah diterima ..." maka endorsmen merujuk pembuatan tuntutan kepada penjamin dan bukannya pemfailan suatu tuntutan di mahkamah. Perkataan "diterima" bermakna penerimaan tuntutan oleh penjamin dari penuntut. Endorsmen tidak bercakap mengenai pemfailan suatu tuntutan di mahkamah.

(4) Hujah responden mengenai kesamaran endorsmen atau keterpakaian kaedah *contra proferentum* seperti yang diputuskan oleh *MBf Insurans Sdn Bhd v. Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA)*, bukanlah isu yang perlu diputuskan di sini. Pihak-pihak telah bersetuju bahawa satu-satunya isu yang perlu diputuskan adalah sama ada endorsmen telah melanggari s. 29.

Case(s) referred to:

MBf Insurans Sdn Bhd v. Lembaga Penyatuan Dan Pemulihan Tanah Persekutuan (FELCRA) [2007] 6 CLJ 639 CA ***(refd)***

New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd [1979] 1 LNS 64 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 29

Rules of the High Court 1980, O. 14A

For the appellant - KY Lim; M/s Kadir, Wong, Lin & Co

For the respondent - Dewi Rahmaz Majidi; State AG's Chambers

[Appeal from High Court, Miri; Civil Summons No: 21-1-2000 (MR)]

Reported by Usha Thiagarajah

JUDGMENT

Abu Samah Nordin JCA:

[1] The only issue in this appeal is whether a term in the letter of guarantee which limits the time within which all claims under the said guarantee shall be made, violates s. 29 of the Contracts Act 1950 ("the Act") and therefore void to that extent.

[2] The brief facts are as follows. The appellant gave a letter of guarantee dated 25 April 1997 to the respondent as a security to guarantee the payment of all sums of money due and payable by Niah Native Logging Sdn Bhd to the respondent under timber licence No. T/0169 provided that the claim in writing was made during the validity period of the guarantee. The guarantee was valid for a period of one year from 25 April 1997 and expired on 24 April 1998. The appellant's liability under the guarantee is limited to RM100,000 only.

[3] Niah Native Logging Sdn Bhd ('the principal debtor') was the first defendant in the court below while the appellant herein, was named as the second defendant in the court below. The first defendant was the holder of a timber licence No. T/0169 to take forest produce granted under the Forest Ordinance of Sarawak. This appeal however does not concern the first defendant.

[4] As at January 1998 the first defendant had an outstanding bill of RM118,790.69 in respect of timber royalty. It had defaulted in its obligations to pay the said sum. The default occurred during the validity period of the guarantee. The respondent however took no action to call on the guarantee. It allowed the guarantee to lapse.

[5] It was only almost six months later that the respondent, by a letter dated 20 October 1998, called on the guarantee and claimed a sum of RM100,000 from the appellant. It was this delayed demand that resulted in the standoff between the parties, which culminated in the civil suit against the appellant. The appellant refused to honour the guarantee as the guarantee had expired on 24 April 1998 and the demand was made outside the validity period of the guarantee.

[6] At the High Court, the sole issue before the learned judge was stated as follows:

> Whether section 29 of the Contracts Act 1950 is applicable to the terms and conditions stipulated in the letter of guarantee that require all claims under the guarantee to be made during the one year guarantee period.

[7] By consent of both parties, the learned judge made an order that the question of law and the construction of the letter of guarantee be determined under O. 14A of the Rules of the High Court 1980. After having heard the parties the learned judge held that the clause requiring the claim under the guarantee to be made within the one year guarantee period has the effect of limiting the period within which the respondent may enforce its right against the appellant and was therefore void to that extent by virtue of s. 29 of the Act. Accordingly the learned judge held that the appellant was liable under the guarantee and entered judgment in the sum of RM100,000 against the appellant. Being dissatisfied, the appellant appealed to this court.

[8] For convenience, the relevant terms of the said letter of guarantee and s. 29 of the Act are reproduced below:

Letter of guarantee

This guarantee is effective from 25th April 1997 and shall expire on 24th April 1998.

All claims, if any, in respect of this guarantee shall be made during the guarantee period failing which we shall be deemed to have been discharged and released from all and any liability under this guarantee.

Section 29 of the Act

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

[9] The appellant's contention before us is that the impugned term in the letter of guarantee does not contravene s. 29 of the Act as it merely requires the claims to be made within the one year guarantee period. The word 'claims' in the letter of guarantee means a letter of demand (*Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd* [1979] 1 LNS 64) and not filing a writ. It only contravenes s. 29 of the Act if the said term in the letter of guarantee limits the respondent's right to file an action to a period of less than six years, which is the period provided under the Limitation Ordinance of Sarawak.

[10] It is further submitted that the cases pertaining to insurance claims relied upon by the respondent are not applicable to a contract of guarantee as under the contract of insurance the insurer had benefitted from the premiums collected whereas under the contract of guarantee the guarantor did not collect any premium or make profit from the principal debtor.

[11] Learned counsel for the respondent contends that the term in the guarantee limiting the time to make a claim within the one year validity period violates s. 29 of the Act. The limitation period under the Limitation Ordinance Sarawak is six years. She referred to *MBf Insurans Sdn Bhd v. Lembaga Penyatuan Dan Pemulihan Tanah Persekutuan (FELCRA)* [2007] 6 CLJ 639, where this court held that the claim on the security guarantee given by the appellant made after the expiry of the said guarantee was, on its proper construction, a valid claim.

[12] Section 29 states, "Every agreement ... which limits the time within which he may thus enforce his rights is void to that extent". It is not denied that the word agreement in s. 29 of the Act includes a contract of guarantee. Now the question is this. How does one enforce his right under the guarantee when the principal debtor defaults?. The answer is clearly by making a written claim on the guarantee. This is a prerequisite under the said guarantee. It expressly states,

> On notice in writing of any default ... in the payment of royalty or other sum under the said licence given to us, within seven days from receipt of such notice we undertake to pay the government of Sarawak all sums then due under this guarantee.

[13] If the claim is satisfied, that is the end of the matter. The claimant had thereby effectively enforced his right. In such a case it is not necessary for him to take any other step to enforce his rights, such as filing a writ of action. The word "enforce" in s. 29 of the Act therefore does not necessarily mean that a person has to enforce his rights by an action in court. In the context of the letter of guarantee herein the letter of demand by the respondent is itself an expedient means, and the proper means, to enforce the guarantee. It is not a precondition that the respondent must file an action in court to enforce its claim under the guarantee. It is only where the demand is not honoured that the respondent may commence an action in court.

[14] The effect of inserting a clause imposing a deadline to make a claim becomes clearer when we consider the following scenario. The principal debtor defaults on the last day and after the bank had closed its business for the day. The claimant, that is the respondent in our case, would be completely shut out from enforcing its rights by way of a simple notice of demand. It is trite law that a notice of demand is a condition precedent to filing a writ of action. It is thus obvious to me that the term in the letter of guarantee had the effect of limiting the respondent to enforce its rights to make a claim within the one year guarantee period when the limitation period of six years under the Limitation Ordinance, Sarawak had not expired. Such term contravenes s. 29 of the Contracts Act 1950 and is therefore void to that extent: See *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230.

[15] What I have said so far is on the construction of s. 29 of the Act *vis-a-vis* the impugned term in the letter of guarantee. The outcome of this appeal can even be determined on the construction of the letter of guarantee itself.

[16] How does one construe a guarantee containing a term limiting the time to make a claim within a specified period? One of the ways is to adopt a commercial commonsense approach as was done by this court in *MBf Insurans Sdn Bhd v. Lembaga Penyatuan Dan Pemulihan Tanah Persekutuan, (FELCRA)*, *supra*. In that case, the appellant, an insurance company, by a security guarantee dated 18 August 1989 agreed to provide a guarantee that a sum of RM22,107 would be paid to the respondent upon demand. The period of guarantee was from 15 June 1989 to 14 June 1990. It was then extended for another year by way of an endorsement with the words:

> This guarantee will expire on 14 June 1991. Claims, if any, must be received on or before this date.

The respondent made the demand on 21 June 1991, which was rejected by the appellant as it was made after the expiry of the guarantee. The magistrate dismissed the respondent's action on the ground that the claim was made out of time. The High Court reversed the decision on the ground that the shelf-life of the guarantee contravened s. 29 of the Contracts Act 1950. The appellant appealed to this court. It was dismissed. Gopal Sri Ram JCA, in his judgment at pp. 644-647 said:

> This guarantee will expire on 14 June 1991. Claims, if any, must be received on or before this date.
>
> [2] In my judgment, what the first sentence in this endorsement means is this. The appellant will be liable on the guarantee until 14 June 1991. If anything happens after that date no liability attaches. Next, what does the second sentence mean? It may mean one of three things. It may mean that the respondent must file its action against the appellant before 14 June 1991. Or it may mean that if there has been any breach by the contractor during the period expiring 14 June 1991, then the guarantee must be called upon on or before 14 June 1991. Or it may mean that the respondent may make a demand in respect of an event that occurred during the life of the guarantee and such demand may be made upon the appellant even after 14 June 1991.

> [3] I do not think that the first meaning is correct. Assume that the event giving rise to liability occurred on 13 June 1991. It would mean that the respondent has only a day to institute proceedings. Or what if the respondent becomes aware of the event on 15 June 1991. It would be impossible then for the respondent to commence an action before 14 June 1991 and for that reason his claim would be barred. The first meaning produces an absurd result and therefore cannot possibly be the meaning intended.
>
> [4] Take the second meaning. Again test it against the same assumed facts. And again it produces an absurd result. How could the respondent make a claim in respect of an event that occurred before 14 June 1991 of which it had notice only after that date? So the second meaning cannot hold.
>
> [5] Now take the third possible meaning. If the event occurred even on 13 June 1991, the appellant would remain liable and notice of it may be given after that date. I am hence inclined to the view that it is the third meaning that is correct.
>
> [12] Once you arrive at the conclusion that the guarantee was intended to cover an event occurring before 14 June 1991, the fact that the claim in respect of that event was made after 14 June 1991 cannot prove fatal to the respondent. Were it otherwise, an absurdity would, as I have already said, result and that is something the parties cannot possibly have intended. The meaning which I consider is the true meaning of the endorsement, in my view, accords with business commonsense.

[17] On the factual matrix of the case before us it is to be noted that the default alleged to have been committed by Niah Native Logging Sdn. Bhd. occurred during the life span of the guarantee. It is also noted that the respondent made its claim after the expiry of the guarantee. Applying the approach and position taken by the court as stated in the abovementioned passage, we are inclined to hold that the fact that the claim by the respondent was made outside the guarantee period, does not render such claim bad and invalid.

[18] In the premises, the appellant's appeal is dismissed with costs.

[19] My learned brother Azhar Haji Ma'ah JCA had seen this judgment in draft and expressed his agreement with it.

Hishamudin Mohd Yunus JCA (dissenting):

[20] This is an appeal by the appellant (the second defendant in the High Court action) against the decision of the learned judge of the High Court of Miri who on 11 December 2001 had allowed the respondent's (the plaintiff in the High Court action) claim against the appellant. The decision is made pursuant to O. 14A of the Rules of High Court 1980.

[21] On 25 September 2001, with the consent of the appellant and the respondent, the learned judge of the High Court of Miri made an order under O. 14A of the Rules of the High Court that a determination of a question of law be made that would determine and disposed off the dispute between the parties, namely:

> Whether section 29 of the Contracts Act 1950 is applicable to the terms and conditions stipulated in the letter of guarantee (Exh. STM-1) that require all claims to be made during the one-year guarantee period.

[22] If the answer to the above question is in the affirmative (that is to say, s. 29 of the Contracts Act is applicable), then the appellant (the second defendant at the High Court) as a guarantor is liable to pay the respondent a sum of RM100,000 as stipulated in the letter of guarantee.

[23] However, if the answer is in the negative (that is to say, s. 29 of the Contracts Act is not applicable), then the respondent (the plaintiff at the High Court) has no right to any claim against the appellant under the letter of guarantee and the respondent's claim against the appellant ought to be dismissed.

[24] Order 14A provides:

> **1 Determination of questions of law or construction (O. 14A r. 1)**
>
> (1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:
>
> (a) Such question is suitable for determination without the full trial of the action; and

(b) Such determination will finally determine the entire cause or matter or any claim or issue therein. A

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

[25] Section 29 of the Contracts Act provides: B

29. Agreements in restraint of legal proceedings void.

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. C

[26] The determination of the issue turns on the words:

which limits the time within which he may thus enforce his rights D

[27] The impugned paragraph of the letter of guarantee stipulates:

All claims, if any in respect of this guarantee shall be made during the guarantee period failing which we shall be deemed to have been discharged and released from all and any liability under the guarantee. E

[28] The question for determination is therefore:

Does the impugned paragraph limits the time within which the respondent may enforce their rights under the letter of guarantee? F

[29] In order to fully appreciate the issue, I shall briefly allude to the background facts.

[30] A company called Niah Native Logging Sdn. Bhd. (Niah Native) was issued with a forest timber licence under the Forest Ordinance of Sarawak. Niah Native is the first defendant in the respondent's writ action before the High Court. As a condition for the issuance of the licence and as required by s. 53 of the Ordinance, Niah Native furnished the respondent with a letter of guarantee dated 25 April 1997. The appellant bank is the guarantor under this letter of guarantee. Under the letter of guarantee, the appellant guaranteed the respondent that Niah Native would pay all royalties due to the respondent, and in the event that Niah Native fails to pay the royalties due, then, the G H I

appellant, as a guarantor, would be liable to pay the respondent a sum not exceeding RM100,000. According to the letter of guarantee, the guarantee period is effective from 25 April 1997 and shall expire on 24 April 1998. The letter of guarantee, however, also stipulates that:

> All claims, if any in respect of this guarantee shall be made during the guarantee period failing which we shall be deemed to have been discharged and released from all and any liability under the guarantee.

[31] As things turned out, Niah Native failed to pay the respondent the royalties in the sum of RM685,110.85. It is not clear as to when the event of default by Niah Native occurred. It is only averred that the failure to pay the royalties by Niah Native occurred during the guarantee period. Anyhow, it is not disputed by the parties that the event of default by Niah Native had occurred (ie, nonpayment of royalties), and that it occurred during the period of the validity of the guarantee ie, from 25 April 1997 up to 24 April 1998.

[32] It is not disputed that the guarantee period as stipulated under the letter of guarantee is from 25 April 1997 to 24 April 1998.

[33] It is also not disputed that the respondent made a claim to the appellant (as guarantor) on 20 October 1998, that is, on a date that is nearly six months after the guarantee period.

[34] The learned High Court Judge took the view:

> The said clause requiring the claim under the guarantee to be made within the one year guarantee period has in my view the effect of limiting the period within which the plaintiff may enforce their right against the second defendant under the guarantee, and therefore rendered void to that extent by section 29 of the Contracts Act.

[35] Accordingly, the learned judge gave judgment in favour of the respondent (the plaintiff before the High Court Judge).

[36] Before this Court of Appeal, it is the contention of the appellant that since the claim by the respondent was made after the expiration of the guarantee period, therefore, by reason of the limitation paragraph, the appellant was discharged from any liability under the guarantee.

[37] The respondent, on the other hand, contends that this time limitation paragraph does not protect the appellant from liability under the letter of guarantee, as this paragraph is invalid by reason of s. 29. This limitation paragraph, it is contended, offends s. 29. A

[38] With respect, I am unable to accept the submission of Puan Dewi Rahmaz, the Senior Legal Officer (for the respondent) that the relevant paragraph of the letter of guarantee that prescribes the time frame within which to make the claim contravenes s. 29 of the Contracts Act. B

[39] In my judgment, I accept the contention of the learned counsel for the appellant, Encik Lim, that the limitation paragraph does not offend s. 29 of the Contracts Act. It is true that the time limitation paragraph of the letter of guarantee stipulates a time limitation for the making of a claim in the event of a default. But, in my view, that limitation is only a time limitation as to the making of a claim. That paragraph is not concerned with the respondent's right to enforce the claim once a claim has been made within the prescribed time limit; whereas s. 29, on the other hand, is not concerned with time limitation as to the making of a claim. Section 29 is only concerned with time limitation as to the enforcement of a right. Making a claim and enforcing a right are two different things. Enforcing a right only arises once a valid claim has been made. One must not confuse between 'making a claim' and 'enforcing a right'. Making a claim is only the preliminary step; whereas enforcing a right only arises once this preliminary step has been taken – provided it is validly taken and the claim or demand remains unsatisfied. In other words, the making of a claim precedes the enforcement of a right. But it must be appreciated that the making of a claim does not necessarily result in the enforcement of a right; for the party against whom the claim is made may very well satisfy the claim, and if this happens then the matter will just end there: the question of the enforcement of a right then does not arise. Further, the making of a claim does not involve a judicial proceeding action ie, a court action. It merely entails the making of a demand – a demand following a breach (see *Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd.* [1979] 1 LNS 64, and *MBf Insurans Sdn Bhd v. Lembaga Penyatuan & Pemulihan Tanah Persekutuan (FELCRA)* [2007] 6 CLJ 639 per Gopal Sri Ram JCA (as he then was)). But enforcing a right involves a court action. And to enforce the right C D E F G H I

A in the present case, in the context of s. 29, is to enforce the right to payment. But the right to payment does not arise unless the respondent had made a valid claim, a valid demand for payment. A valid claim or a valid demand means a claim or demand made within the prescribed time frame.

B

[40] In *MBf Insurans* the guarantee has an endorsement that states:

> This guarantee will expire on 14 June 1991. Claim, if any, must be received on or before this.

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[41] In this case cited the letter of demand to the guarantor was only made on 21 June 1991, that is to say, seven days after the expiry date of 14 June. The guarantor refused to make payment because the claim was made outside the guarantee period. The D claimant, in response, invokes s. 29 of the Contracts Act and argued that the endorsement was bad in law as it contravened s. 29. Gopal Sri Ram JCA (with whom Hassan Lah JCA agreed, but Suriyadi JCA took a different view) said:

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> [7] That brings me to the meaning of the word 'claim' in the second sentence. The intermediate appellate judge thought that it meant the filing of a suit. But with respect, I do not agree. 'Claims if any must be received on or before this date' must mean a demand by the respondent upon the appellant in respect of a breach occurring before 14 June 1991. This is consistent with the F third interpretation of the endorsement. I draw support for my view from the judgment of Mohamed Azmi J (as he then was) in *Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd* [1980] 1 MLJ 172 where he held that the word 'claim' which appears in the endorsement to the guarantee in the present case (at p 176):

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> > cannot mean filing a writ, as under Limitation Ordinance. The word 'claim' must necessarily mean a demand by the creditor from the surety.

[42] In the present case, the learned Senior Legal Officer for the H respondent refers to *New Zealand Insurance Co. Ltd. v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230. That case is not relevant as the facts there are different. In that case it was a claim under a policy of insurance. The condition of the policy stipulates a period of 12 months after the rejection of the insurance claim

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within which a suit may be brought against the insurance company. Thus the case concerns a condition that stipulates the filing of a suit within a stipulated time frame and not the making of a claim. The Supreme Court correctly held that the condition contravenes s. 29 of the Contracts Act.

[43] The learned counsel for the respondent also refers to the judgment of Suriyadi JCA in *MBf Insurans* (a case that I have cited earlier). In this case, Suriyadi JCA, delivering the minority (but not a dissenting) judgment, agreed with the claimant and the finding of the learned High Court Judge that the endorsement in that case contravenes s. 29 of the Contracts Act and therefore was void.

[44] With respect, I am unable to share with the view of Suriyadi JCA; for the endorsement clearly states 'claim, if any, must be received …'. Therefore, the endorsement refers to the making of a claim to the guarantor, and not to the filing of a claim in court. The word 'received' must mean the receipt of the claim by the guarantor from the claimant. The endorsement does not speak of the filing of a claim in court. But the learned judge in his judgments states:

> [40] What is more pertinent is the issue of whether the restrictive bar of **filing** a claim on or before 14 June 1991 had contravened s. 29 of the Contract Act or not. (emphasis added.)

[45] Suriyadi JCA appears to interpret the word 'claim' in the endorsement to mean the filing of a claim in court when the endorsement clearly does not mention of the filing of a claim: instead the endorsement speaks of a claim being 'received'.

[46] It must be pointed out that in *MBf Insurans* the views of Suriyadi J was not shared by the other two members of the panel, namely, Gopal Sri Ram JCA and Hassan Lah JJCA. These two learned Judges (the majority judgment) arrived at the same decision as Suriyadi JCA (that the appeal ought to be dismissed) but without reliance on s. 29 of the Contracts Act. The majority judgment implies that the endorsement does not contravene s. 29 of the Contracts Act. Indeed, Gopal Sri Ram JCA said:

A [1] I too would dismiss this appeal. But for reasons different from those given by my learned brother Suriyadi in his judgment. The appellant must, in my opinion, fail on the point of construction of the relevant endorsement which reads as follows:

> This guarantee will expire on 14 June 1991. Claim, if any, must be received on or before this.

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[47] The majority judgment in *MBf Insurans* only took the view that the above endorsement was ambiguous and therefore, applying the *contra proferentum* rule, gave judgment in favour of the C respondent and dismissed the appeal of the appellant.

[48] Now, I feel compelled to add that this aspect of the judgment of the majority judgment in *MBf Insurans* pertaining to ambiguity and the *contra proferentum* rule is not relevant for the D purpose of the present case since whether the limitation paragraph in the letter of guarantee in the instant case is ambiguous or not is not in issue: what has been agreed by the parties to be the only issue to be determined is whether or not the limitation paragraph contravenes s. 29 of the Contracts Act. I feel E compelled to make this remark because upon examining the written submission of the learned Senior Legal Officer (in particular, para. 3.12), the learned counsel appears to embark upon an alternative argument that the limitation paragraph in the instant case is ambiguous and that the court, by reason of the F majority judgment in *MBf Insurans*, ought to invoke the *contra proferentum* rule in favour of the respondent. With respect, the parties in the present case are bound by the terms of the consent order when they invoked O. 14A. The consent order of 25 September 2001 reads:

G IT IS HEREBY ORDERED BY CONSENT that it is agreed between the Plaintiff and the 2nd Defendant that the only issue in this suit between the Plaintiff and the 2nd Defendant is whether Section 29 of the Contracts Act 1950 is applicable to the terms and conditions stipulated in the Letter of Guarantee (Ex STM - H 1) that require all claim to be made during the one year guarantee period and IT IS FURTHER ORDERED BY CONSENT that such question of law and the construction of guarantee (Ex STM-1) to be determined under Order 14A of the Rules of the High Court 1980 and the hearing is adjourned to the 11th December, 2001.

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[49] The words "the only issue in this suit" in the above order is significant. And the only issue to be determined is the issue pertaining to s. 29. Whether the impugned paragraph is ambiguous, or whether the *contra proferentum* rule is applicable, is not an issue for determination.

[50] I therefore allow the appeal with costs.

[Appeal allowed with costs.]